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U-004-504 .1

DISAPPROVAL OF DRAFT OU 2 RECORD OF DECISION

03/09/95

USEPA DOE-FN
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COMMENTS



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

6700

I-1732

REPLY TO THE ATTENTION OF:

MAR 0 8 1995

Mr. Jack R. Craig
United States Department of Energy
Feed Materials Production Center
P.O. Box 398705
Cincinnati, Ohio 45239-8705

HRE-8J

RE: Disapproval of Draft OU 2
Record of Decision

Dear Mr. Craig:

The United States Environmental Protection Agency (U.S. EPA) has completed its review of the United States Department of Energy's (U.S. DOE) Draft Operable Unit (OU) 2 Record of Decision (ROD). Although the ROD follows U.S. EPA guidance and is consistent with the Proposed Plan there are a few issues that must be resolved.

Specifically, the ROD must be changed, including the declaration, to reflect that the ROD is the document which constitutes the Comprehensive, Environmental Response, Compensation, and Liability Act (CERCLA) waiver. There is no other independent document which will contain the CERCLA waiver. Also, U.S. DOE has committed to adopting the OU 5 waste acceptance criteria of 1,030 parts per million total uranium in the OU 2 ROD. This change must be made and reflected in the document.

Therefore, U.S. EPA hereby disapproves the OU 2 ROD pending incorporation of acceptable responses to comments and associated changes in the ROD. A final copy of ROD with responses to comments must be submitted to U.S. EPA within thirty (30) days receipt of this letter.

Please contact me at (312) 886-0992 if you have any questions.

Sincerely,

James A. Saric
Remedial Project Manager
Technical Enforcement Section #1
RCRA Enforcement Branch

Enclosure

cc: Tom Schneider, OEPA-SWDO
Jack Baublitz, U.S. DOE-HDQ
Don Ofte, FERMC0
Jim Thiesing, FERMC0
Terry Hagen, FERMC0



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Commenting Organization: U.S. EPA
Section #: Resp. Summ. Page #: RS-3-13
Original Specific Comment #: 6
Comment: The text responds to a comment regarding the permanence of the on-site disposal facility. Commentors questioned whether on-site disposal could ever be considered to be permanent. Additional information should be added to the text to explain that, in accordance with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), permanence is measured on a scale, from remedial actions that require long-term maintenance on the lower end of the scale (that is, less permanent) to remedial actions that permanently destroy contaminanats and require no long-term maintenance at the higher end of the scale. Providing a reference to the NCP and explaining the concept of permanence will strengthen the response.



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REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

MAR 02 1995

REPLY TO THE ATTENTION OF:

CM-29A

MEMORANDUM

SUBJECT: February 8, 1995, Draft Record of Decision
for Operable Unit 2

FROM: *Brian A. Darwick*
Brian A. Darwick
Assistant Regional Counsel

TO: James A. Saric
Remedial Project Manager

Attached are the Office of Regional Counsel's comments on the draft Record of Decision (ROD) for Operable Unit Two at the Fernald Environmental Management Project (FEMP).

1. The draft ROD suggests that the United States Environmental Protection Agency's (U.S. EPA) concurrence with a Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675, waiver of the Ohio siting criteria will be contained in some other independent document. However, pursuant to 40 C.F.R. § 300.430(f)(5)(ii)(C), the ROD must describe, among other things:

The applicable or relevant and appropriate requirements of other federal and state laws that the remedy will not meet, the waiver invoked, and the justification for invoking the waiver.

Therefore, all justification for the waiver must be included in the ROD and U.S. EPA's signing the ROD would constitute U.S. EPA's concurrence with the waiver. Throughout, the draft ROD must be revised to reflect that this document, and not some anticipated document, constitutes the CERCLA waiver.

While it is true, as the United States Department of Energy (U.S. DOE) states on page 8-10, that the responsiveness summary is a part of the ROD, U.S. EPA believes certain other parts of the draft ROD should also be clarified. In order to obtain U.S. EPA concurrence for the proposed waiver, U.S. DOE must make the following revisions to the draft ROD:

- a. Page 9-1, Line 11: Because of the nature of the remedial wastes that will remain on-site, U.S. EPA considers continued Federal ownership of the FEMP to be a key element of the proposed remedial action. Any proposal to transfer ownership

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to a non-Federal entity would be a significant change from the selected remedy and could not be consummated prior to completion of the ROD amendment procedures of 40 C.F.R. § 300.435(c)(2)(ii), including public notice and comment. Amendment of the ROD could only take place upon a demonstration that the requirements of Section 120(h) of CERCLA, 42 U.S.C. § 9620(h), have been satisfied and that such transfer will in no way undermine the integrity of any remedy selected for this Site. U.S. DOE must revise the ROD to explicitly acknowledge these restrictions.

- b. Page 9-2, Line 33: Insert an explanation that cost estimates are derived based upon conservative estimates of the volume of on-site remedial wastes only. During implementation, the disposal unit will be constructed in phases and carefully sized to accommodate only that volume of on-site remedial wastes actually generated. As a result, the actual size and cost of the disposal unit may be smaller and lower than estimated and there will be no excess disposal capacity for any other wastes, including off-site wastes. Creation of any excess capacity would, among other things, not be cost effective as is required by Section 121 of CERCLA, 42 U.S.C. § 9621.
- c. Page 10-5, Line 17: Insert an explanation that Section 3734.02(G) of the Ohio Revised Code allows the Director of the Ohio Environmental Protection Agency (OEPA) to grant an exemption to the siting criteria and that OEPA has issued guidance on such exemptions. OEPA maintains that its guidance allows exemptions to the siting criteria only in cases of certain geological conditions and that engineering controls cannot be used to supplement those conditions. Because the FEMP does not meet those geological conditions, U.S. EPA and U.S. DOE considered the waiver authority of Section 121(d)(4)(D) of CERCLA, 42 U.S.C. § 9621(d)(4)(D), and determined, as explained in the following narrative, that the geological conditions at the FEMP, if supplemented by proven and reliable engineering controls, would attain a level of performance at least equivalent to that required by the State exemption guidance. Therefore, the selected remedy invokes the CERCLA waiver authority with respect to the State siting requirements.
- d. Page 10-5, Line 22: Add a sentence stating that the NCP explains that the purpose of this waiver is to allow for the use of alternative but equivalent technologies and that comparison based on risk is only permitted where the original standard is risk-based. The State exemption guidance, with its focus on existing geological conditions, is for the most part analogous to a technology standard but also appears to be, with respect to level of performance, risk and technology based. Therefore, the following analysis of each of the

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CERCLA waiver criteria compares performance of the selected remedy with the State exemption guidance requirements in technological terms. Also included, for level of performance only, is a risk based analysis.

U.S. EPA realizes that some of this information is contained elsewhere in the ROD (e.g., page 7-13) but believes it is necessary to comprehensively address this issue within Section 10.

- e. Page 10-8, Line 35: Replace "[n]ot applicable to this circumstance" with a statement that construction of the enhanced disposal unit would not take significantly longer than the time required for a disposal unit which merely meets the State's solid waste disposal unit requirements.
 - f. Page 10-8, Line 39: Add an explanation that this waiver applies only to on-site remedial wastes and in no way to any other wastes. Because the CERCLA exemption (see 40 C.F.R. § 300.400(e)) from Federal, State, and local permit requirements applies only to on-site remedial waste, treatment, storage, or disposal of any off-site waste at the FEMP would be an activity subject to Federal, State, and local permitting requirements. Such requirements generally include public notice and comment procedures.
2. Page 5-1, Line 21: To assist the reader, U.S. EPA suggests moving the explanation in Section 6.1.1. concerning how constituents of concern are determined to this page or at least here cross-referencing Section 6.1.1.
3. RS-3-13, Comment a: U.S. EPA agrees with the apparent U.S. DOE conclusion that a two mile buffer zone is not necessary for protection of human health and the environment. However, the U.S. DOE response does not address the commentor's request.
4. RS-3-36, Response c: U.S. EPA wants to expand upon the U.S. DOE response to this comment by saying that the primary enforcement vehicle for the ROD is the 1991 Amended Consent Agreement which requires U.S. DOE to implement, subject to U.S. EPA approval, remedial design and remedial action (RD/RA). The 1991 Amended Consent Agreement includes provisions for stipulated penalties in the event of U.S. DOE non-compliance with RD/RA requirements. Non-compliance would include failure by U.S. DOE to implement the remedy selected in the ROD. In addition, Section 310(a)(1) of CERCLA, 42 U.S.C. § 9659(a)(1), affords persons the right, under certain circumstances, to take civil action to enforce the terms of the 1991 Amended Consent Agreement.